

Dec 27, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WILLIAM F. MARX,

Plaintiff,

v.

CAROLYN W. COLVIN,

Defendant.

NO: 2:16-CV-00352-FVS

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 16, 17. This matter was submitted for consideration without oral argument. The plaintiff is represented by Attorney Joseph M. Linehan. The defendant is represented by Special Assistant United States Attorney Michael Tunick. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~ 1

1 Court **GRANTS** Plaintiff's Motion for Summary Judgment, ECF No. 16, and  
2 **DENIES** Defendant's Motion for Summary Judgment, ECF No. 17.

3 **JURISDICTION**

4 Plaintiff William F. Marx protectively filed for disability insurance benefits  
5 on May 13, 2014, alleging an onset date of April 23, 2012. Tr. 359. On August 4,  
6 2014, Plaintiff was awarded a closed period of benefits from April 23, 2012 to  
7 June 12, 2103, which was affirmed on reconsideration. Tr. 137-38. On October 22,  
8 2014, Plaintiff filed a request for reconsideration claiming he continued to be  
9 disabled after the closed period, which was denied. Tr. 177, 181-83. Plaintiff  
10 requested a hearing before an administrative law judge ("ALJ"), which was held  
11 before ALJ R.J. Payne on April 24, 2015. Tr. 41-124. The ALJ denied benefits on  
12 August 27, 2015. Tr. 152-71. On March 18, 2016, the Appeals Council vacated the  
13 decision and remanded the matter to ALJ Payne to clarify the relevant period at  
14 issue at the hearing level, and "apply the sequential evaluation process to  
15 determine whether claimant was disabled during the period at issue." Tr. 173-74. A  
16 second hearing was held before ALJ Payne on April 25, 2016. Tr. 1291-1337.  
17 Plaintiff was represented by counsel and testified at the hearing. *Id.* Medical  
18 expert Reuben Beezy, M.D. testified that Plaintiff met the listing through October  
19 2015, and after that he "would be sedentary." Tr. 1296-1319. On May 5, 2016,  
20 ALJ Payne found Plaintiff was under a disability from April 23, 2012 through

1 February 1, 2015; but found medical improvement occurred February 2, 2015 and  
2 Plaintiff's disability ended as of that date. Tr. 16-38. The Appeals Council denied  
3 review on June 11, 2016. Tr. 1. The matter is now before this court pursuant to 42  
4 U.S.C. § 405(g).

5 **BACKGROUND**

6 The facts of the case are set forth in the administrative hearing and  
7 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner,  
8 and will therefore only the most pertinent facts are summarized here.

9 William F. Marx ("Plaintiff") was 35 years old at the alleged onset date. Tr.  
10 52. Plaintiff completed twelfth grade and two years of college. Tr. 1319-1320. He  
11 was diagnosed aplastic anemia in February 2012, and underwent an allogenic stem  
12 cell transplant on June 12, 2012. Tr. 24, 942. After the transplant, in November  
13 2012, Plaintiff was diagnosed with Graft Versus Host Disease ("GVHD"). *See* Tr.  
14 646, 661. In January 2015, Plaintiff had a diagnosed "flare" of GVHD, which was  
15 treated, and improved in February 2015. Tr. 1226-1240, 1258-1261. Then, in  
16 October 2015, medical records show a "possible flare" of GVHD. Tr. 1280-1289.  
17 The record before the ALJ, and this Court, does not include evidence of treatment  
18 after October 2015. *See* Tr. 28.

19 At the second hearing, Plaintiff testified that since October 2015, if he does  
20 not take a nap every day, it "takes a minimum of three days to recover;" and he

1 only sleeps through the night twice in a two week period. Tr. 1322-1323. He  
2 testified that he could walk around a three block loop at the furthest; could stand  
3 for five minutes at a time, and longer if he has a counter to lean on for balance;  
4 could sit for an hour and a half; and has three to four “good days” in an average  
5 week. Tr. 1329-1332. Plaintiff testified that he has joint pain and “burning skin;”  
6 and has had “mild flares” of GVHD since October 2015, which often happens  
7 when he starts to taper off of Prednisone. Tr. 1333-1335.

8 **STANDARD OF REVIEW**

9 A district court’s review of a final decision of the Commissioner of Social  
10 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
11 limited; the Commissioner’s decision will be disturbed “only if it is not supported  
12 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,  
13 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a  
14 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159  
15 (quotation and citation omitted). Stated differently, substantial evidence equates to  
16 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and  
17 citation omitted). In determining whether the standard has been satisfied, a  
18 reviewing court must consider the entire record as a whole rather than searching  
19 for supporting evidence in isolation. *Id.*

1       In reviewing a denial of benefits, a district court may not substitute its  
2 judgment for that of the Commissioner. If the evidence in the record “is  
3 susceptible to more than one rational interpretation, [the court] must uphold the  
4 ALJ’s findings if they are supported by inferences reasonably drawn from the  
5 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district  
6 court “may not reverse an ALJ’s decision on account of an error that is harmless.”  
7 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate  
8 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The  
9 party appealing the ALJ’s decision generally bears the burden of establishing that  
10 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

## 11                   **SEQUENTIAL EVALUATION PROCESS**

12       The Commissioner has established a multi-step sequential evaluation  
13 process for determining whether a person’s disability continues or ends. 20 C.F.R.  
14 § 404.1594 (2012).<sup>1</sup> This multi-step continuing disability review process is similar  
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17       <sup>1</sup>Many of the regulations cited in this decision were revised effective March 17,  
18 2017. *E.g.*, Revisions to Rules Regarding the Evaluation of Medical Evidence, 82  
19 Fed. Reg. 5871 (January 18, 2017) (revising 20 C.F.R. § 404. 1594). Since the  
20 revisions were not effective at the time of the ALJ’s decision, they does not apply

1 to the five-step sequential evaluation process used to evaluate initial claims, with  
2 additional attention as to whether there has been medical improvement. *Compare*  
3 20 C.F.R. § 404.1520 *with* § 404.1594(f) (2012). A claimant is disabled only if her  
4 impairment is “of such severity that [he] is not only unable to do [his] previous  
5 work[,] but cannot, considering [his] age, education, and work experience, engage  
6 in any other kind of substantial gainful work which exists in the national  
7 economy.” 42 U.S.C. § 1382c(a)(3)(B).

8 Determination of whether a person’s eligibility for disability benefits  
9 continues or ends involves an eight-step process. 20 C.F.R. § 404.1594(f)(1)-(8)  
10 (2012). The first step addresses whether the claimant is engaging in substantial  
11 gainful activity. 20 C.F.R. § 404.1594(f)(1) (2012). If not, step two determines  
12 whether the claimant has an impairment or combination of impairments that meets  
13 or equals the severity of an impairment listed in 20 C.F.R. pt. 404, Subpt. P, App.  
14 1. 20 C.F.R. § 404.1594(f)(2) (2012). If the impairment does not meet or equal a  
15 listed impairment, the third step addresses whether there has been medical  
16 improvement in the claimant’s condition. 20 C.F.R. § 404.1594(f)(3) (2012).

17 Medical improvement is “any decrease in the medical severity” of the impairment

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18 to this case. For revised regulations, the version effective at the time of the ALJ’s  
19 decision is noted.

1 that was present at the time the individual was disabled or continued to be disabled.  
2 20 C.F.R. § 404.1594(b)(1) (2012).

3       If there has been medical improvement, at step four, it is determined  
4 whether such improvement is related to the claimant's ability to do work—that is,  
5 whether there has been an increase in the individual's residual functional capacity.  
6 20 C.F.R. § 404.1594(f)(4) (2012). If the answer to step four is yes, the  
7 Commissioner skips to step six and inquires whether all of the claimant's current  
8 impairments in combination are severe. *Id.* If there has been no medical  
9 improvement or medical improvement is not related to the claimant's ability to  
10 work, the evaluation proceeds to step five. *Id.*

11       At step five, if there has been no medical improvement or the medical  
12 improvement is not related to the ability to do work, it is determined whether any  
13 of the special exceptions apply. 20 C.F.R. § 404.1594(f)(5) (2012). At step six, if  
14 medical improvement is shown to be related to the claimant's ability to work, it is  
15 determined whether the claimant's current impairments in combination are  
16 severe—that is, whether they impose more than a minimal limitation on the  
17 claimant's physical or mental ability to perform basic work activities. 20 C.F.R. §  
18 404.1594(f)(6) (2012); *see also* 20 C.F.R. § 404.1521 (1985). If the step six  
19 finding is that the claimant's current impairments are not severe, the claimant is no  
20 longer considered to be disabled. 20 C.F.R. 404.1594(f)(6) (2012).

If the step six finding is that the claimant's current impairments are severe, at step seven, a residual functional capacity finding is made and it is determined whether the claimant can perform past relevant work. 20 C.F.R. § 404.1594(f)(7) (2012), 404.1520(e); *see also* S.S.R. 82-61.

Finally, at step eight, if the claimant cannot perform past relevant work, the Commissioner must prove there is alternative work in the national economy that the claimant can perform given her age, education, work experience, and residual functional capacity. 20 C.F.R. § 404.1594(f)(8) (2012). If the claimant cannot perform a significant number of other jobs, she remains disabled despite medical improvement; if, however, she can perform a significant number of other jobs, disability ceases. *Id.*

## ALJ'S FINDINGS

At step one, the ALJ found Plaintiff has not engaged in substantial gainful activity since April 23, 2012, the date the Plaintiff became disabled. Tr. 24. At step two, the ALJ found that from April 23, 2012 through February 1, 2015, the period during which Plaintiff was under a disability, he had the following severe impairments: aplastic anemia; and graft versus host disease. Tr. 24. The ALJ also found that from April 23, 2012 through February 1, 2015, the period during which Plaintiff was disabled, the severity of Plaintiff's impairments met the criteria of sections(s) 7.17 and 13.28 of 20 CFR Part 404, Subpart P, Appendix 1; thus,

1 Plaintiff was under a disability, as defined by the Social Security Act, from April  
2 23, 2012, through February 1, 2015. Tr. 24-27. At step three, the ALJ found that  
3 medical improvement occurred as of February 2, 2015, the date Plaintiff's  
4 disability ended. Tr. 27. At step four, the ALJ found that the medical improvement  
5 that has occurred is related to the ability to work because Plaintiff no longer has an  
6 impairment or combination of impairments that meets or medically equaled the  
7 severity of a listing. Tr. 27.

8 Because the finding at step four indicated medical improvement, the ALJ  
9 skipped to step six and found that Plaintiff's severe impairments were the same as  
10 those present from April 23, 2012 through February 1, 2015. Tr. 27. The ALJ  
11 concluded that beginning February 2, 2015, Plaintiff has had the RFC to perform  
12 sedentary work as defined in 20 CFR 404.1567(a) except he is limited to no  
13 climbing of ladders, ropes or scaffolds; and no exposure to unprotected heights or  
14 hazardous machinery. Tr. 27. At step seven, the ALJ found Plaintiff was unable to  
15 perform past relevant work. Tr. 30. At the last step, considering Plaintiff's age,  
16 education, work experience, and RFC, the ALJ found there have been jobs that  
17 exist in significant numbers in the national economy that Plaintiff can perform. Tr.  
18 30. On that basis, the ALJ concluded that Plaintiff's disability ended February 2,  
19 2015. Tr. 30.

20 **ISSUES**

1 Plaintiff seeks judicial review of the Commissioner's final decision denying  
2 her disability benefits under Title II of the Social Security Act. ECF No. 16.  
3 Plaintiff raises the following issue for this Court's review: whether Plaintiff was  
4 denied a full and fair hearing.

5 **DISCUSSION**

6 Plaintiff argues he was denied a full and fair hearing.<sup>2</sup> ECF No. 16 at 15-16.  
7 Additionally, Plaintiff argues the ALJ failed to properly evaluate the medical  
8 evidence, improperly determined Plaintiff was not credible, erred by finding  
9 Plaintiff did not meet the listings at step three for the period after February 2, 2015,  
10 failed to support the RFC assessment with substantial evidence, and erred by

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11  
12 <sup>2</sup> Plaintiff argues that he was denied a fair opportunity to present evidence "in the  
13 alternative," that is, only if the Court declines to find that Plaintiff continued to  
14 meet the listing at step three after February 2, 2015, and/or make any findings as to  
15 whether the ALJ erred in finding medical improvement occurred after the same  
16 date. *See* ECF No. 16 at 15. However, as discussed in detail herein, the ALJ failed  
17 to conduct a full and fair hearing as to the relevant time period at issue in this case,  
18 particularly in regards to Plaintiff's RFC. Thus, the Court remands to the ALJ in  
19 order to fully and fairly develop the record as to the time period after February 2,  
20 2015, and properly reconsider all steps of the sequential analysis after that date.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~

1 failing to hear testimony from a vocational expert. ECF No. 16 at 7-16. Because  
2 the Court agrees that Plaintiff was denied due process in this case for the reasons  
3 discussed below, the case is remanded with instructions to conduct a de novo  
4 hearing as to the time period beginning February 2, 2015. Thus, the Court need not  
5 consider the additional arguments.

6 “[A]pplicants for social security benefits are entitled to due process in the  
7 determination of their claims.” *Holohan v. Massanari*, 246 F.3d 1195, 1209 (9th  
8 Cir. 2001). “The fundamental requirement of due process is the opportunity to be  
9 heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*,  
10 424 U.S. 319, 333 (1976) (internal quotation marks omitted). Accordingly, under  
11 the Social Security Act, claimants shall be given reasonable notice and opportunity  
12 for a hearing with respect to a decision rendered by an ALJ, during which the ALJ  
13 may examine witnesses and receive evidence. 42 U.S.C. 405(b)(1). Hearing  
14 procedures may be informal, but they must be “fundamentally fair.” *Richardson v.*  
15 *Perales*, 402 U.S. 389, 401–02 (1971); *see also Martise v. Astrue*, 641 F.3d 909,  
16 921–22 (8th Cir. 2011) (“procedural due process requires disability claimants to be  
17 afforded a full and fair hearing”); *Ferriell v. Comm'r of Soc. Sec.*, 614 F.3d 611,  
18 620 (6th Cir. 2010) (“In the context of a social security hearing, due process  
19 requires that the proceedings be full and fair.”). Moreover, the “ALJ in a social  
20 security case has an independent duty to fully and fairly develop the record and to

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~

1 assure that the claimant's interests are considered." *Tonapetyan v. Halter*, 242 F.3d  
2 1144, 1150 (9th Cir. 2001).

3 Here, Plaintiff argues he was denied "a fair opportunity to present evidence  
4 relevant to the issues." Specifically, he contends that

5 the ALJ's written decision analyzes a RFC period that he told [Plaintiff's]  
6 attorney that he would not be using. In Finding/Conclusion #9, the ALJ  
7 considered [Plaintiff's] residual functional capacity beginning February 2,  
8 2015. However, at the hearing, the ALJ specifically said he would not be  
9 considering [Plaintiff's] RFC after September 30, 2014, and later changed  
10 the date to January 1, 2015. The evidentiary record is unclear as to the  
11 relevant period for considering [Plaintiff's] RFC. Moreover, [Plaintiff] was  
12 denied the opportunity to fully address the RFC issue. [Plaintiff's] attorney  
13 was told to restrict evidence to a timeframe that the ALJ did not use. As  
14 noted in the Appeals Council remand decision, the contradiction in the  
15 hearing record and ALJ findings raises the issue of whether [Plaintiff]  
16 received a full and fair hearing.

17 ECF No. 16 at 15-16 (citing Tr. 173). Defendant argues that Plaintiff's argument  
18 "misreads" the transcript and contends that the ALJ did not "restrict the  
19 presentation of evidence to a particular time-period or state that he would not be  
20 considering Plaintiff's RFC after a particular date." ECF No. 17 at 16. According  
Plaintiff's RFC after January 1, 2015. ECF No. 17 at 16 (citing Tr. 1336).  
However, after exhaustive review of the hearing transcript, the Court finds this  
statement is not an entirely accurate representation of the record; nor does it  
address the consistent indecision expressed by the ALJ in deciding the relevant  
time period under consideration throughout the hearing.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~

1 At the start of the April 2016 hearing, the ALJ accurately notes that Plaintiff  
2 has filed an application for disability benefit under Title II of the Social Security  
3 Act and has met the earnings requirement only through September 30, 2014; thus,  
4 in order “to prevail in this case,” Plaintiff must show he became disabled on or  
5 before the date last insured, September 30, 2014. Tr. 20, 1293. The ALJ then notes  
6 that he “believes” that Plaintiff met the listing at step three for the time period of  
7 April 25, 2012 to June 12, 2013, and somewhat inexplicably asks Plaintiff’s  
8 counsel if Plaintiff would be willing to amend his alleged onset date to June 13,  
9 2012; which counsel agrees to “with the understanding that the listing was met for  
10 the year prior.” Tr. 1294. However, the written decision does not reflect an  
11 amendment of the alleged onset date.

12 Next, at the hearing, the ALJ asked Plaintiff’s attorney if there were any  
13 medical records outstanding that predate the date last insured (“DLI”) September  
14 30, 2014, and noted the reason he is “talking about that particular day” is that the  
15 Appeals Council remanded “for the purpose of establishing ...the date in question  
16 in this hearing.” Tr. 1295-96. In keeping with this goal, the ALJ began his  
17 examination of the medical expert (“ME”) by noting that the “determination in this  
18 case to the claimant’s condition or conditions from the onset date of April 23<sup>rd</sup>,  
19 2012 to September 30<sup>th</sup>, 2014, the date last insured, hereinafter called the relevant  
20 period.” Tr. 1297. This would seem to imply that the ALJ was considering a closed

ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT ~

1 period of disability; however, after the ME opines that Plaintiff would meet the  
2 listings up to October 2015, the ALJ states that he will “need an RFC for October  
3 of 2015 onward, unless, unless, the claimant’s satisfied within closed period on the  
4 meeting of listings here.” Tr. 1314. Plaintiff’s counsel says “no,” at which point  
5 the ME opines as to Plaintiff’s RFC from October 2015 forward. Tr. 1315-18.  
6 Then, at the conclusion of the ME’s testimony, the following exchange occurs  
7 between the ALJ and the ME:

8 ALJ: And the -- this RFC is for the period prior September 30th, 2014,  
9 Doctor?

10 ME: How, how much prior?

11 ALJ: Well, that’s the date last insured.

12 ME: Okay.

13 ALJ: But we’re right -- actually you’re running it, you’re running it from  
14 October 1st, 2015 --

15 ATTY: Yes.

16 ALJ: -- which is the --

17 ATTY: The date he no longer meets the listing?

18 ME: Right.

19 ALJ: Okay. All right. Okay.

20 Tr. 1318-19.

ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT ~

1       Next, upon questioning of Plaintiff, the ALJ almost immediately appears to  
2 limit his testimony to the period prior to the date last insured, as opposed to the  
3 period since October 2015 when the ME opined Plaintiff met the listing.

4       ATTY: Are you still experiencing since October of last year fatigue?

5       PL: Yes.

6       ATTY: In the course -- how many days a week do you -- do you take naps?

7       PL: Every -- if I can.

8       ALJ: Well, again, the date last insured is September of 2014.

9       ATTY: The --

10      ALJ: So --

11      ATTY: -- date last insured, Your Honor, we have listings testimony through  
12 last October.

13      ALJ: I know.

14      ATTY: So I'm coming from last October.

15      ALJ: Okay. Go ahead.

16      ATTY: Since --

17      ALJ: It has to be before October. Now -- well okay.

18      ATTY: From October.

19      ALJ: This gets a little tricky.

20      ATTY: Yeah.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~

1 Tr. 1320-21. Plaintiff's counsel then proceeds to ask Plaintiff questions about his  
2 fatigue both before, and after, October 2015 (Tr. 1321-23); until the following  
3 exchange occurs between the ALJ and Plaintiff's counsel regarding the relevant  
4 time period:

5 ALJ: And, and just for the record, I've, I've been thinking a little bit about  
6 this. I want to restrict that RFC to the prior -- the, the time prior to the date  
7 last insured. Well, I'll let -- I'll -- I'll move to the meeting out prior -- past  
8 the date last insured as far as the RFC. It will be for the period September --  
9 before September 30th, 2014.

10 ATTY: I'm confused, Your Honor.

11 ALJ: Well, that's the best I can say it.

12 ATTY: Okay. Are you --

13 ALJ: Because I -- because if I go to the vocational expert I, I can either give  
14 him that RFC or I'll give him no RFC at all and just, and just, and just stop  
15 with the, the meeting of the listing.

16 ATTY: Well, he meets the listings into October.

17 ALJ: I understand that.

18 ATTY: Okay.

19 ALJ: But the -- we still have a date last insured problem. I mean, that, that  
20 carries it past that point.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~

1 ATTY: Okay.

2 ALJ: But as far as the date last insured I would look at what, what in the  
3 RFC would be reasonable for that period of time when we go to the  
4 vocational expert. And that's what I'm going to do.

5 ATTY: Okay. Even though the doctor said that would be the RFC  
6 subsequent to the listing being met?

7 ALJ: I know because the date last insured problem.

8 ATTY: Okay. But if he's --

9 ALJ: It's, it's fine to the listing.

10 ATTY: Yeah.

11 ALJ: It's not fine to the RFC.

12 ATTY: So are -- I, I am thoroughly confused at the point, Your Honor,  
13 frankly.

14 ALJ: I'm sorry.

15 ATTY: Okay.

16 ALJ: I'm just stating what I'm going to do.

17 ATTY: Okay.

18 ALJ: If I can't -- I -- first of all, I don't believe the doctor would go out to  
19 October 2015. I believe it'd be January of 2015, but I'll, I'll put over the  
20 doctor on that.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~

1 ATTY: To October of --

2 ALJ: To October ... of 2015. I think, I think it really goes to January 1<sup>st</sup> of  
3 2015, which is a little bit at -- three months after the date last insured, which  
4 is, which is okay. It's a -- we can go over the, the line on what meets a  
5 listing. But as far as the RFC, I --

6 ATTY: So between September of 2014 and now is when you want me to ask  
7 the limitations of Mr. --

8 ALJ: **No, I don't care what his limitations are now because the, the date**  
9 **last insured is September 30th, 2014. What his limitations are now don't**  
10 **-- aren't relevant.**

11 ATTY: Okay. Thank you. Prior to September of 2014, were you napping  
12 twice --

13 ALJ: We'll just say October, prior to October of 2014 because the, the date  
14 last insured is September 30th, 2014.

15 Tr. 1323-25 (emphasis added). After a short break, the ALJ then states that after  
16 further "thought" he has decided not to assess an RFC because any RFC would be  
17 after the date last insured. Tr. 1328. Despite the ALJ's stated intention to not assess  
18 an RFC, Plaintiff's attorney continues asking questions regarding his subjective  
19 complaints and limitations at the time of the hearing. Tr. 1329-35. Finally, at the  
20 conclusion of the hearing, the ALJ states:

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~

1 ALJ: ... I don't want to blindside you. I said that, that I thought I'd [be]  
2 going up to October 1st, 2015 based on the medical expert's testimony. But  
3 I'm looking again at 21 page 8 and it said he had the possibility of a flare....  
4 So I'm going to go to January 1st, 2015. And again, that's after the date last  
5 insured, but that's okay. It -- we can continue on after the date last insured  
6 with that as far as an RFC's concerned now. Now, I'm going to do an RFC  
7 after, after the date last insured. And we don't need an RFC since we have  
8 meeting through the date last insured. So I have no further questions.

9 ATTY: Okay.

10 ALJ: Anything else you'd like to add? I'm not going to call a vocational  
11 expert either.

12 ATTY: You're not going to?

13 ALJ: I'm not going to call the vocational expert.

14 ATTY: Okay.

15 ALJ: Because there's nothing to give him.

16 ATTY: I agree.

17 Tr. 1335-36.

18 Despite the apparent indecision as to the relevant time period during the  
19 hearing, outlined in detail above, the ALJ's written decision found medical  
20 improvement occurred on February 2, 2015, and assessed an RFC from that date to

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~

1 the date of the decision. Tr. 21, 27. Plaintiff argues the ALJ's restriction of  
2 evidence regarding his RFC during the hearing "to a time frame he did not use"  
3 denied him the opportunity to fully address the RFC issue, and thus denied him his  
4 due process right to a full and fair hearing. ECF No. 16 at 15-16. The Court agrees.  
5 During the hearing, the ALJ appears to misconstrue the DLI, September 30, 2014,  
6 as the end of a closed period of benefits after which he is not required to consider  
7 evidence; as opposed to the date Plaintiff was required to establish disability in  
8 order to receive Title II benefits. This misunderstanding is most apparent when the  
9 ALJ states he "[doesn't] care what [Plaintiff's] limitations are now because the, the  
10 date last insured is September 30th, 2014. What his limitations are now [...] aren't  
11 relevant" (Tr. 1325); and is further reflected in the ALJ's written decision, which  
12 states that he did not call a vocational expert to testify "in light of the closed  
13 period, as discussed [in the decision] ending after the date last ensured of 9/30/14."  
14 Tr. 20. The Court finds the ALJ's persistent uncertainty as to the relevant time  
15 period under consideration the hearing, and the resulting confusion understandably  
16 noted by Plaintiff' counsel, deprived Plaintiff of a full and fair hearing.<sup>3</sup>

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18 <sup>3</sup> As correctly noted by Plaintiff, the Appeals Council's remand of the initial  
19 decision by ALJ Payne in this case similarly found that the record was unclear  
20 regarding the relevant period at issue; and specifically noted that due to the

1       Defendant argues the ALJ “is responsible for assessing a claimant’s RFC,”  
2 and here “Plaintiff’s RFC was based on Dr. Beezy’s testimony.” ECF No. 17 at  
3 16. However, the ALJ’s reliance on Dr. Beezy’s testimony to assess the RFC does  
4 not render the due process violation harmless. An ALJ’s error is harmless,  
5 including an alleged due process violation, “where it is inconsequential to the  
6 ultimate nondisability determination.” *Molina*, 674 F.3d at 1115; *Ludwig v. Astrue*,  
7 681 F.3d 1047, 1053–55 (9th Cir. 2012) (ALJ’s ex parte communication violated  
8 due process but error was harmless where the record as a whole showed the ALJ’s  
9 decision would not have been any different without such communication). In other  
10 words, if there remains substantial evidence to support the ALJ’s ultimate non-  
11 disability determination, any error is deemed harmless and does not warrant  
12 reversal. *See id.*; *Carmickle v. Comm’r*, 533 F.3d 1155, 1162 (9th Cir. 2008). Here,  
13 as discussed in detail above, the ALJ did not precisely define the relevant time  
14 period during the hearing, which included Dr. Beezy’s expert testimony; thus, the  
15 ALJ’s reliance on Dr. Beezy’s testimony in assessing the RFC cannot constitute  
16 substantial evidence to support the ALJ’s ultimate finding. Moreover, the ALJ’s  
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18 inconsistency between the hearing record, and the findings in the written decision,  
19 “it [was] not clear that [Plaintiff] received a full and fair hearing.” ECF No. 16 at  
20 15-16 (citing Tr. 173).

ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT ~

1 authority to assess the RFC does not absolve him of his independent duty to “fully  
2 and fairly develop the record and to assure that the claimant’s interests are  
3 considered.” *Tonapetyan*, 242 F.3d at 1150.

4 For all of these reasons, the Court finds that Plaintiff was not afforded a full  
5 and fair hearing by the ALJ, and remand is appropriate.

## 6 CONCLUSION

7 The ALJ’s decision was not supported by substantial evidence and free of  
8 legal error. Remand is appropriate when there are outstanding issues that must be  
9 resolved before a determination can be made, and it is not clear from the record  
10 that the ALJ would be required to find a claimant disabled if all the evidence were  
11 properly evaluated. *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004);  
12 *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000). Here, the ALJ found  
13 that “[f]rom April 23, 2012 through February 1, 2015, the severity of Plaintiff’s  
14 impairments the criteria of section(s) 7.17 and 13.28 of 20 C.F.R. Part 404, Subpart  
15 P, Appendix 1;” and thus, Plaintiff was under a disability from April 23, 2012  
16 through February 1, 2015. Tr. 24-27. This finding was supported by substantial  
17 evidence, and it is clear from the record that the ALJ would be required to find the  
18 Plaintiff disabled during this time frame regardless of the denial of due process  
19 discussed in detail above. However, because Plaintiff was not afforded a full and  
20 fair hearing, the Court cannot find there are no outstanding issues to be resolved

ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT ~

1 before a determination can be made regarding whether Plaintiff was disabled  
2 beginning February 2, 2015. Thus, remand is necessary for the ALJ to conduct a  
3 full and fair hearing, and determine whether Plaintiff was under a disability as of  
4 February 2, 2015. The ALJ should reconsider the evidence, make a new credibility  
5 determination, and conduct a new sequential evaluation analysis, ensuring all  
6 findings are supported by legally sufficient reasoning and are adequately  
7 explained.

8 | ACCORDINGLY, IT IS HEREBY ORDERED:

9       1. Plaintiff's Motion for Summary Judgment, ECF No. 16, is **GRANTED**.

10      2. Defendant's Motion for Summary Judgment, ECF No. 17, is **DENIED**.

11 The District Court Executive is hereby directed to enter this Order and  
12 provide copies to counsel, enter judgment in favor of the Plaintiff, and **CLOSE** the  
13 file.

14 || **DATED** December 27, 2017.

*s/Fred Van Sickles*

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Fred Van Sickle  
Senior United States District Judge

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~  
23